STATE OF MICHIGAN

COURT OF APPEALS

RAY A. CARLSON, Individually and as Personal Representative of the Estate of TAMARA R. CARLSON, Deceased, and as Next Friend and Conservator of RAYMOND CARLSON, a Minor, and DONALD FULLERTON, Individually and as Personal Representative of the Estate of MICHAEL FULLERTON, Deceased,

Plaintiffs-Appellees/Cross-Appellants,

v

WAYNE COUNTY ROAD COMMISSION,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
May 21, 1999

No. 185022
Wayne Circuit Court
LC No. 92-228180 NI

RAY A. CARLSON, Individually and as Personal Representative of the Estate of TAMARA RENEE CARLSON, Deceased, and as Next Friend and Conservator of RAYMOND CARLSON, a Minor, and DONALD FULLERTON, Individually and as Personal Representative of the Estate of MICHAEL FULLERTON, Deceased,

Plaintiffs-Appellees,

v

WAYNE COUNTY ROAD COMMISSION,

Defendant-Appellant.

No. 210966
Wayne Circuit Court
LC No. 92-228180 NI

Before: Kelly, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

In Docket No. 185022, defendant appeals by leave granted and plaintiffs cross-appeal by leave granted from a March 30, 1995, order granting plaintiffs a new trial. In Docket No. 210966, we are presented with a jurisdictional question centered on a nunc pro tunc order issued by the trial court after plainitffs had filed an application for delayed cross-appeal with this Court in Docket No. 185022.[1] We affirm the order granting a new trial, and find that the trial court did not err in issuing the nunc pro tunc order.

This case stems from a fatal car accident that occurred on March 28, 1991. As the car was traveling northbound on a gravel road, the driver lost control of the vehicle as it crested a hill. The car then swerved to the left-hand side of the road and struck a tree. Two of the car's four passengers were killed and one sustained severe brain damage. The jury found that defendant had not acted negligently in any of the ways claimed by plaintiffs. When the jury was polled, one juror indicated that she was "undecided."

On December 21, 1994, plaintiffs filed a motion to set aside the jury verdict, for judgment notwithstanding the verdict (JNOV) and for a new trial. At the January 27, 1995 hearing held on plaintiffs' motion, the trial judge denied the motion for JNOV, and ruled that the jury had not been improperly instructed, that improper hearsay testimony had not been erroneously admitted into evidence, and that the verdict was not against the great weight of the evidence. The judge also took under advisement plaintiffs' argument that the court had improperly limited plaintiffs' rebuttal argument, and ordered that additional proceedings would be held on the matter of alleged juror misconduct. On March 30, 1995, the trial court entered an order granting plaintiffs' motion for a new trial based on juror misconduct. After defendant applied for and was granted leave to appeal, plaintiffs filed an application for delayed cross-appeal on November 15, 1995. Then on December 6, 1995, plaintiffs moved that the trial court enter a nunc pro tunc order that would document the court's January 27, 1995 rulings from the bench. After a hearing on the motion, the trial court entered the requested order on December 20, 1995.

Docket No. 210966

In Docket No. 210966, defendant argues that the trial court's December 20, 1995 nunc pro tunc order should be vacated, because at the time it was entered the trial court lacked jurisdiction to enter the order. With respect to the trial court's denial of plaintiffs' (1) motion for JNOV, and (2) motion for a new trial based upon allegations of erroneous jury instructions, the improper admission of hearsay testimony into evidence, and that the verdict was against the great weight of the evidence, we find that the December 20, 1995 order simply supplied an omission in the lower court record of action already taken by the trial court. See *Shifferd v Gholston*, 184 Mich App 240, 243; 457 NW2d 58 (1990) (noting that "[a]n entry nunc pro tunc is proper to supply an omission in the record of action really had, but omitted through inadvertence or mistake"). Given that the lower court record had not been transferred to this Court as of December 20, 1995, we conclude that the trial court had jurisdiction to enter the nunc pro tunc order. MCR 7.208(C)(2).[2]

However, with respect to the part of the nunc pro tunc order that denied plaintiffs' motion for a new trial on the basis that the trial court had improperly limited plaintiffs' rebuttal argument, we conclude that the trial court acted improperly. The record indicates that as of the entry of the nunc pro tunc order, the trial court had not ruled on the rebuttal issue. "[A]n order *nunc pro tunc* may not be utilized to supply previously *omitted action*." *Sleboede v Sleboede*, 384 Mich 555, 559; 184 NW2d 923 (1971) (emphasis in original). Accordingly, the rebuttal issue is not properly before this Court.

Docket No. 185022

As its sole issue in Docket No. 185022, defendant challenges the trial court's decision granting plaintiffs a new trial based on juror misconduct. On December 21, 1994, plaintiffs filed a motion for a new trial, arguing, in part, that their substantial rights were adversely affected when two jurors visited the scene of the accident, and one of the two improperly "communicated his impressions of the scene to the other jurors during deliberations." At hearings held on plaintiffs' motion, several jurors, including the male juror who had allegedly communicated his impressions of the accident scene, were questioned by the court about what had happened and whether the alleged misconduct had influenced their decision.

Defendant argues that the trial court committed legal error when it considered juror evidence in deciding whether to grant plaintiffs' motion. Relying on *Hoffman v Monroe Public Schools*, 96 Mich App 256; 292 NW2d 542 (1980), defendant asserts that a bright line rule exists in Michigan that prohibits jurors from challenging "mistakes or misconduct inherent in the verdict" after the polling and discharge of the jury. *Id.* at 261. We disagree, and thus conclude that the trial court did not commit legal error in questioning jurors about the alleged unauthorized views of the accident scene. Questioning about whether the unauthorized views took place and whether a juror had communicated his impressions of the accident scene to the jury related to extraneous or outside influences on the jury, and thus were legitimate areas of inquiry. See generally *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997); *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 294-295; 494 NW2d 811 (1992); *Hoffman, supra*, 96 Mich App at 256.[3]

However, the trial court's questions regarding whether the verdict was affected by these extraneous errors were improper because those questions invaded the jury's deliberative process. *Hoffman, supra*, 197 Mich App at 293-294; *Hoffman, supra*, 96 Mich App at 261. We conclude, however, that the erroneous admission of juror testimony concerning the deliberative process was harmless given that the trial court did not rely on this testimony when granting plaintiffs' new trial motion. Instead, the trial court looked to objective factors when concluding that plaintiffs were prejudiced by the misconduct, including the fact that the jury verdict could not be sustained without the vote of the juror who acknowledged making the unauthorized view. Cf *Vanden Bosch v Consumers Power Co,* 56 Mich App 543, 557-558; 224 NW2d 900 (1974), rev'd on other grounds 394 Mich 428 (1975) (concluding that prejudice could not be established because even if the juror who improperly viewed an accident scene were disqualified, there would still have been enough votes to sustain the verdict). Further, we note that the record clearly indicates that the road condition was a material issue at trial. Accordingly, we believe that there is a real and substantial probability that the external influence present in this case could have affected the juries' verdict. *Budzyn, supra* at 89. Cf *Gold v Detroit United Railway*, 169 Mich 178, 182; 134 NW 1118 (1912) (observing that under the circumstances of the

case, it was "extremely improbable" that unauthorized view of accident scene by juror could have prejudiced the defendant).

Therefore, we hold that the trial court did not abuse its discretion in granting plaintiffs' motion for a new trial. Because we affirm the trial court's grant of a new trial, we find it unnecessary to address the issues raised in plaintiffs' cross-appeal.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy

[1] In lieu of granting leave to appeal, the Michigan Supreme Court remanded this matter to this Court for consideration as on leave granted.

[2] MCR 7.208(C) provides in relevant part:

> Except as other wise provided by rule, *and until the record is filed in the Court of Appeals*, the trial court or tribunal has jurisdiction
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> ***
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> (2) *to correct any part of the record to be transmitted to the Court of Appeals, but only after notice to the parties and an opportunity for a hearing on the proposed correction.*

[Emphasis added.]

[3] In *Hoffman, supra*, 96 Mich App at 258, the Court noted that its ruling was based in part on a balancing of the public policy goal of protecting the integrity of jury deliberations against the private concern that extraneous influences might unfairly prejudice a litigant. While we agree that litigants have an individual interest in the effect of extraneous influences, we also note that allowing examination of extraneous influences also serves to further the goal of protecting the jury's deliberative process. *Tanner v United States*, 483 US 107, 120; 107 S Ct 2739; 97 L Ed 2d 90 (1987) (observing that evidentiary hearings examining those situations "where extrinsic influence or relationships have tainted the deliberations do not detract from, but rather harmonize with, the weighty government interest in insulating the jury's deliberative process"); Inwinkelried, Evidentiary Distinctions, p 82.